No. 436

BROOKLYN & QUEENS TRANSIT CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 436

BROOKLYN & QUEENS TRANSIT CORPORATION,
Appellant,

vs.

THE CITY OF NEW YORK.
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of said Court to entertain the appeal in the above entitled cause:

1. The appeal is authorized by Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 344(a)).

2. The statutes, the validity of which is involved, are Local Laws of the City of New York known as Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935 (set forth in full as Exhibit C to the amended complaint), and Local Law No. 30 of 1935 (set forth in full as Exhibit D to the amended complaint). These Local Laws were pur-

portedly enacted by the Municipal Assembly of the City of New York under authority granted, respectively, by Acts of the Legislature of the State of New York known as Chapter 873 of the Laws of 1934 (set forth in full as Exhibit A to the amended complaint) and Chapter 601 of the Laws of 1935 (set forth in full as Exhibit B to the amended complaint), which Acts, together, during the period from August 18, 1934, to July 1, 1936, empowered the City of New York to adopt and amend local laws imposing any tax or taxes which said Legislature itself could impose to relieve the people of said City from the hardships and suffering caused by unemployment.

Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, during the calendar year 1935, or any part thereof, equal to three per centum (3%) of its gross income for the calendar year 1935. It is entitled "A Local Law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief."

Said Local Law provides that all revenues and moneys resulting from the imposition of the taxes thereby imposed shall not be credited or deposited in the general fund of the City but shall be deposited in a separate bank account or

accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

Said Local Law No. 30 of 1935 is entitled in the same manner as said Local Law No. 21 of 1934, as amended, and it is substantially in all respects the same in its provisions as said Local Law No. 21 of 1934, as amended, except that it imposes the tax for the period from January 1, 1936 to June 30, 1936.

3. The judgment sought to be reversed was entered on August 9, 1937, and was resettled, on motion of the appellee, on August 11, 1937. The date upon which the application for appeal is presented is August 24, 1937.

4. This action was brought to recover the amounts of taxes collected by the City of New York from the appellant under the said Local Laws, and paid by appellant under duress and protest, on the ground that the said Local Laws are repugnant to the Constitution of the United States.

The amended complaint alleges, in part, that said Local Laws contravene Section 1 of the Fourteenth Amendment to the Constitution of the United States because, among other reasons—

(A) they deny to appellant equal protection of the law, in that, *inter alia*,

(a) the taxes levied thereby are measured by a percentage of gross income and applied to a group of corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profits, the result being that gross inequalities are produced in the distribution of the tax burden, the appellant and all other street rail-

road corporations doing business in the City of New York being taxed far more heavily upon their respective net incomes for relief of unemployment than other utilities in the taxed class,

(b) appellant and other street railroad corporations doing business in the City of New York do not have protection against competition which other utilities, subject to said Local Laws, have, and appellant does not have the advantage enjoyed by other utilities in the taxed class of being assured a fair return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself, from which no release can be obtained by appellant,

(c) the object of said Local Laws is not to raise revennes for the general support of the government but to raise money for a specific and limited purpose and there is no difference between utilities and other businesses which bears any relation to said purpose which justifies a classification by which utilities are taxed for said purpose far more heavily than other businesses, and

(d) the imposition of a tax to be used solely for unemployment relief upon utilities at a rate more than 3,000% in excess of the rate at which other businesses are taxed for said purpose constitutes hostile discrimination against utilities; and

(B) they deprive appellant of its property without due process of law in that the money exactions levied upon appellant thereby are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of another, which expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to

alleviate and do not receive any special benefit from the money expended for such purposes.

The appellee, the City of New York, moved to dismiss the amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action and on the further ground that the court had no jurisdiction of the action. Said motion thus drew into question the validity of the said Local Laws. The Supreme Court of the State of New York at Special Term, Part III thereof, where the motion was originally heard, determined said motion upon authority of, and in accordance with its determination of a like motion in the companion case of *New York Rapid Transit Corporation* v. *The City of New York,* decided simultaneously therewith. The opinion of said Court in said companion case shows that said Court held that the court had jurisdiction of the above-entitled action and that it denied said motion on the ground that the amended complaint sufficiently showed that the said Local Laws denied to the appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. Said opinion in said companion case (the amended complaint in which contains allegations which are substantially identical with those in the amended complaint in the above-entitled action) states:

"Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain of those claims are set forth in various forms, but analysis reduces them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, par-

ticularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

"Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a tax (Clark *v.* Titusville, 184 U. S. 329). Nor is there anything inherently improper in a tax on gross receipts (Metropolis Theatre Co. *v.* Chicago, 228 U. S. 61). Where, however, gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail (Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550). On this point the allegations of the complaint are sufficient. * * *" (97 N. Y. L. J. 241; 251 App. Div. —— .)

The order of the Supreme Court of the State of New York denying said motion to dismiss the amended complaint was made on January 14, 1937, and entered on January 15, 1937.

On appeal by the appellee, said order was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York by order made and entered on May 21, 1937. Before said Appellate Division the appellant contended that said Local Laws were unconstitutional as to it not only upon the ground upon which they were held invalid, upon the allegation of the amended complaint, by

the said Supreme Court at Special Term, but also upon the other grounds alleged in the amended complaint.

On motion of appellee, and by order entered June 1, 1937, the said Appellate Division of the Supreme Court of the State of New York granted appellee leave to appeal to the Court of Appeals of the State of New York from its order affirming said order of said Supreme Court at Special Term, and certified to said Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action." Before said Court of Appeals the appellant contended that said Local Laws were unconstitutional not only upon the ground upon which they were held invalid, upon the allegations of the amended complaint, by the Special Term and the Appellate Division of said Supreme Court, but also upon the other grounds alleged in the amended complaint. Said Court of Appeals expressly determined said appeal and answered said certified question on authority of its decision and opinion in said companion case of *New York Rapid Transit Corporation* v. *The City of New York* (in which a like motion had been made by appellee and in which the action of the Special Term and Appellate Division of said Supreme Court had been the same as in the above-entitled cause). The opinion in said companion case shows that said Court of Appeals held that the court had jurisdiction of the action and that the amended complaint stated a cause of action if said Local Laws violated the Constitution of the United States, but it held that said Local Laws did not violate said Constitution. A copy of said opinion is attached hereto and made a part hereof as Exhibit A (see 275 N. Y. 258; 275 N. Y. Memoranda 2).

On July 13, 1937, said Court of Appeals made and entered its remittitur by which it ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court be reversed and that the amended complaint be dismissed with costs in all courts,

and answered the question certified in the negative. Said Court of Appeals ordered and adjudged that the amended complaint be dismissed on the ground that it failed to state facts sufficient to constitute a cause of action since, it held, the said Local Laws were valid as applied to appellant and did not violate the Constitution of the United States, and by its said remittitur ordered that the record and all proceedings herein be remitted to the Appellate Division of the Supreme Court of the State of New York, there to be proceeded upon according to law.

Said Court of Appeals is the highest court of the State of New York.

By order made and entered on August 6, 1937, said Appellate Division directed that the order and judgment of said Court of Appeals be made its order and judgment, and thereupon and pursuant thereto, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court of the State of New York, New York County, finally determining the action by a dismissal of the amended complaint. Thereafter, upon motion of the appellee, said judgment was resettled, so as to correct certain formal omissions but in no other respect changing it, by order of said Supreme Court made on August 11, 1937, and entered on August 12, 1937.

The said judgment is a final judgment and was entered as a result of a decision by the Court of Appeals, the highest court of the State of New York, which decision turned upon the question as to whether or not the Local Laws of the City of New York above mentioned were repugnant to the Constitution of the United States, and the decision of said Court of Appeals was in favor of their validity. The action is thus one in which an appeal lies to the Supreme Court of the United States as a matter of right.

5. Said record of the proceedings herein is now with the Supreme Court of the State of New York.

6. The following decisions are believed to sustain the jurisdiction of this Court: *Nashville, etc., Ry.* v. *White*, 278 U. S. 456; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Chicago, R. I. & Pac. Ry.* v. *Perry*, 259 U. S. 548, 551; *Senior* v. *Braden*, 295 U. S. 422; *W. H. H. Chamberlin, Inc.*, v. *Andrews, Industrial Commissioner*, 299 U. S. 515; *Nor. Car. R. R. Co.* v. *Zachary*, 232 U. S. 248, 257.

7. The questions sought to be reviewed herein have not been foreclosed by prior decisions of the Supreme Court of the United States.

The amended complaint alleges that the operating expenses of street railroad corporations, such as appellant, are far higher in proportion to gross receipts than the operating expenses of all other corporations included within the class taxed by said Local Laws; that the ratio of net income to gross receipts is far higher in the case of all other types of utilities within the taxed class than in the case of appellant or any other street railroad corporation included therein; that said Local Laws impose a tax measured by a percentage of gross income upon a class which includes corporations the respective businesses of which are so essentially different in character that the ratio of net income to gross income in the case of one is radically less than in the case of another, the result being that said Local Laws produce gross inequality in the distribution of the tax burden within the taxed class itself, taxing some members thereof far more heavily than others on the value of the privileged taxed, so that plaintiff and all other street railroad corporations are taxed far more heavily upon their respective net incomes than other utilities within the taxed class.

No case has been found in which this Court has sustained under the equal protection clause of the Fourteenth Amendment a State tax on gross income as applied to a class of corporations the respective businesses of which are essentially different in character and yield widely varying ratios of profit. On the contrary, in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, the Court held that a graduated tax on gross receipts imposed as a license tax on all retail merchants was unconstitutional, under the Fourteenth Amendment, because of the gross inequalities which the evidence showed resulted therefrom, it appearing that companies with large gross incomes had less net income than companies with smaller gross incomes, that the ratio of net income to gross varied with the character of the business as well as its volume. The Court there said that if a State "desires to tax incomes it must take the trouble equitably to distribute the burden of the impost." See also *Valentine* v. *Great Atlantic & Pacific Tea Company*, 299 U. S. 32.

Apart from the foregoing, the inclusion of appellant in the taxed class was unreasonable, and in violation of said equal protection clause, because, as alleged in the amended complaint, appellant and other street railroad corporations operating in the City of New York do not have protection against competition which other utility corporations have (since appellant meets with serious competition from the operation of street railroads by the appellee itself, without any supervision or control by either division of the Department of Public Service) and since appellant does not have the advantage enjoyed by other utilities of being assured of a fair rate of return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself from which no release can be obtained by appellant. Thus, though nominally a utility, appellant does not have the essential characteristics thereof. Recently the New

York Court of Appeals itself held the Local Laws in question invalid as to a cold storage warehouse corporation on the ground that it did not possess the characteristics of a utility. *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113.

The taxes in question are not for the support of the Government but are to be used exclusively for the purpose of unemployment relief. The amended complaint alleges that utilities are no more responsible for or related to the problem of unemployment relief than other businesses, that utilities receive no special benefit from the taxes in question and that the proceeds thereof are to be used for a purpose which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York. The Supreme Court has repeatedly stated that classification for purposes of taxation must rest upon some real ground of distinction which has a substantial relation to the object of the legislation. "* * * the classification itself [must] be rested upon some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins* v. *Riley*, 268 U. S. 137, 142; see also *Colgate* v. *Harvey*, 296 U. S. 404, 423). The *declared object* of this legislation was the relief of suffering caused by unemployment and there are, under the allegations of the amended complaint and as a matter of judicial notice, no differences between utilities and other businesses as related to *such object* which would justify the taxes here in question. This Court has never held that a State may, within the limits of the Fourteenth Amendment, impose a tax on a narrow class of corporations much in excess of that at which other corporations are taxed, not for the general support of the Government but for a special and limited purpose no more related to such narrow class of corporations than to corporations and

businesses generally. Construing comparable provisions of State constitutions, State courts have held invalid taxes imposed for special purposes not peculiarly related in some fashion to the persons upon whom the taxes were imposed, on the ground that classification for taxation must be grounded upon some distinction which has a substantial relation to the particular object to be accomplished by the law in question. *Lowry* v. *City of Clarksdale,* 154 Miss. 155, 122 So. 195, 197-198; *Continental Ins. Co.* v. *Smrha,* 131 Nebr. 791, 270 N. W. 122; *Louisiana* v. *Merchants' Insurance Co.,* 12 La. An. 802.

The imposition of a tax to be used solely for unemployment relief upon utilities at a rate *more than 3,000% in excess of the rate at which other businesses are taxed* for the same purpose constitutes hostile discrimination against utilities and denies to them the equal protection of the law, in violation of the Fourteenth Amendment. The difference in the rate of the tax is the same as though ordinary businesses were taxed at less than 3% of their gross income and utilities at 90% thereof. In *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, Mr. Justice Brandeis stated (pp. 417-418) that the Fourteenth Amendment forbids "action attributable to hostile discrimination against particular persons or classes."

The money exactions levied upon appellant by the Local Laws in question are not for the general support of the Government and hence are not properly taxes but are an "expropriation of money from one group for the benefit of another" in violation of the due process clause of the Fourteenth Amendment. Such expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exaction are designed to alleviate. *United*

States v. *Butler*, 297 U. S. 1, 58, 61. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113. *Edye* v. *Robertson*, 112 U. S. 580, 595-596; *United States* v. *La Franca*, 282 U. S. 568, 572.

Dated August 24, 1937.

Respectfully submitted,

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Appellant,
By PAUL D. MILLER,
GEORGE D. YEOMANS,
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EXHIBIT "A".

NEW YORK RAPID TRANSIT CORPORATION, *Respondent*,

v.

CITY OF NEW YORK, *Appellant*.

New York Rapid Transit Corp. v. *City of New York*, 251 App. Div. —, reversed.

Argued June 10, 1937; decided July 13, 1937.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 21, 1937, which affirmed an order of Special Term denying a motion by defendant for a dismissal of the complaint.

The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

Paul Windels, Corporation Counsel (*Paxton Blair, Oscar S. Cox, Sol Charles Levine* and *Meyer Bernstein* of counsel), for appellant.

Harold L. Warner, Henry Root Stern, Paul D. Miller and *George D. Yeomans* for respondent.

J. Osgood Nichols for Thomas E. Murray, Jr., as receiver of Interborough Rapid Transit Company, *amicus curiæ*.

FINCH, *J.*:

The city of New York appeals from the denial of a motion to dismiss the complaint, affirmed without opinion by the Appellate Division, two justices dissenting, and here by reason of the Appellate Division certifying the question: Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action for money had and received, brought by a transit company to recover taxes paid under protest, upon the ground that the taxing statutes are unconstitutional.

The city of New York, pursuant to enabling acts passed by the State Legislature, which empowered the city to impose any tax or taxes which the Legislature itself could

impose, to raise money for unemployment relief, has enacted local laws placing a tax of three per cent on the gross income of all utilities subject to the supervision of either division of the Department of Public Service. (Local Law No. 30, 1935; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935.)

At the outset, the city urges that the complaint should be dismissed on the ground that the remedy by way of action for money had and received is not available since the local laws provide an exclusive remedy for the recovery of illegally collected taxes, whether the illegality of the collection is because of over-assessment, over-valuation, or unconstitutionality. The remedy provided by the local laws furnishes a more expeditious procedure than the action at common law with its six year Statute of Limitations. It requires that all applications for refunds be made within one year of the payment of the tax and that a review by certiorari be applied for within thirty days of the refusal of the Comptroller to grant the refund. (Local Law No. 30, 1935, § 10; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935, § 10.)

The provision on which the city relies applies to applications for refunds when the tax is "erroneously or illegally collected." The city points out that this is not a case where the laws as a whole are void. As applied to other public utilities they are perfectly valid. Only as applied to corporations situated as is the plaintiff is the claim made that they are void. But while it is clear that an exclusive remedy is provided for the recovery of illegal or erroneous exactions of an otherwise valid tax, it is not at all clear that it was intended to apply where the claim is made that the tax itself is void because of unconstitutionality. In view of this ambiguity we cannot construe the laws as depriving the plaintiff of the common law remedy of action for money had and received. (See *Buder* v. *First Nat. Bank*, 16 Fed. Rep. [2d] 990, 993; certiorari denied, 274 U. S. 743.) Having reached the conclusion that the exclusive remedy provided for by the local law does not apply where it is claimed that the tax is unconstitutional, it becomes unnecessary to determine whether the

powers delegated by the Legislature to the city of New York included the power to provide such an exclusive remedy.

This brings us to the contention that the tax is unconstitutional.

The constitutionality of this statute, in so far as the tax is levied on certain other public utilities, has been upheld. (*New York Steam Corp.* v. *City of New York*, 268 N. Y. 137; *Garfield* v. *New York Tel. Co.*, 268 N. Y. 549.) The contention is now made that in so far as the tax is levied on transit companies bound by contract to exact no more than a five-cent fare, it is invalid. This argument has been rejected in the Federal courts (*Southern Blvd. Ry. Co.* v. *City of New York*, 86 Fed. Rep. [2d] 633; certiorari denied, 301 U. S. —), but that determination, while entitled to great weight, is not binding on this court.

At Special Term the complaint was held invalid on every ground save one, and that presents the major question for decision. To paraphrase that ground as alleged in the complaint, the tax was imposed at the same rate on gross incomes of different types of corporations "* * * which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another * * *."

Special Term, after conceding that exact equality is not required of a tax and that there is nothing inherently improper in a tax on gross receipts, sustained the complaint on the ground that "* * * gross inequalities result from that method of taxation, and where this inequality is effectuated by the definiton of the class to be taxed, the tax must fail," citing *Stewart Dry Goods Co.* v. *Lewis* (294 U. S. 550).

The particular inequality and inequity claimed by the plaintiff is that it is arbitrarily classified, and that the burden of the tax does not fall equally on all those within the group—that the transit companies are required to pay a much greater percentage of their profits than other utilities. In other words, the constitutional objection is to the inclusion of corporations with relatively small net earnings under a fixed income tax rate, in a class with cor-

porations enjoying a ratio of net to gross so radically different as to effect an inequality of burden. Even if so, this does not furnish sufficient reason for declaring a tax invalid where it is imposed upon a group otherwise reasonably classified. Thus in *Alaska Fish Co.* v. *Smith* (255 U. S. 44), a tax imposed on herring products was held valid although no tax was levied on other fish or fish products. Also taxes imposed upon wholesale dealers in oil and like products, and not on other wholesale dealers (*S. W. Oil Co.* v. *Texas*, 217 U. S. 114), and taxes upon chain stores (*Tax Commissioners* v. *Jackson*, 283 U. S. 527), and many like taxes, have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray* v. *United States*, 195 U. S. 27, 56 *et seq.*)

The tax on gross receipts, which was held unconstitutional in *Stewart Dry Goods Co.* v. *Lewis* (294 U. S. 550), was a graduated or sliding scale tax on gross receipts, as contrasted with the fixed rate tax in the case at bar, and it was held therein by a majority of the court that there had been "no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance" (p. 559).

The fallacy in the contention that the tax is unconstitutional because it classifies transit companies having a present small margin of profit and contractual inhibition against raising the fare charged by them, with other utilities having much larger margins of profit, is further revealed when we take into consideration that transit companies might have been grouped by themselves and a three percent gross receipts tax imposed while a separate three percent tax was imposed on other utilities. The transit companies could make no valid objection to a tax so imposed. Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as

part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications.

The plaintiff insists also that the complaint is sufficient upon other grounds denied by the court at Special Term and affirmed by the Appellate Division. The plaintiff argues that the tax in question impairs the obligations of the contract of plaintiff with the city in violation of section 10 of article I of the Federal Constitution. The fact that the transit company, with State sanction, has entered into a contract with the city of New York which provides that it shall not charge more than a five-cent fare, in and of itself does not entitle it to exemption from tax. It has long been established that a grant of a franchise does not carry with it an implied surrender of the power to tax. (*Memphis Gas Light Co.* v. *Shelby County*, 109 U. S. 398; *St. Louis* v. *United Rys. Co.*, 210 U. S. 266; *Puget Sound Light & Power Co.* v. *Seattle*, 291 U. S. 619.)

In *Brooklyn Bus Corp.* v. *City of New York* (274 N. Y. 140, 147) the contract specifically provided that "any new form of tax or additional charge that may be imposed by any ordinance of the City or resolution of the Board upon or in respect of the franchise * * * shall be deducted from the compensation payable to the City." In that case we held that the contract provision was intended to apply to local laws as well as other forms of additional taxes. The contracts of the transit companies with the city contain no such provision, and no reason appears for reading such a provision into the contracts. The transit companies contracted with the city to provide service at a five-cent fare, and to apportion their gross revenues according to a formula whereby the city and the companies are to share the income, but only after the companies have been paid interest and sinking fund allowances on new moneys invested in the project. Taxes, of course, have priority over such interest and sinking fund payments.

Nevertheless, an attempt is made to argue that the imposition of the tax impairs the obligations of the contract in violation of article I, section 10, of the Federal Constitution because it enables the city to obtain funds out of

the gross income without giving priority to the interest and sinking fund payments. The right to tax cannot be lost by such tenuous implication, and all doubt vanishes when we find that the contract itself makes provision for the deduction of taxes from gross revenues, and refers to "all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the lessee in connection with or incident to the operation of the railroad and the existing railroads." There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city.

Plaintiff further contends that the local laws in question deny plaintiff the equal protection of the laws under the Federal Constitution, in that they classify street railroad corporations and other utilities for taxation at a higher rate than ordinary business corporations for the special purpose of unemployment relief.

No one of the above contentions is well founded. We have already decided that the imposition of a tax on utility companies without imposing a similar tax on other industries and businesses is a valid classification and does not constitute a denial of the equal protection of the laws. (*New York Steam Corp.* v. *City of New York*, 268 N. Y. 137; *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619.)

Likewise the tax is not invalid because imposed upon utilities with the proceeds earmarked for purposes of unemployment relief. In sustaining the imposition upon the processing of cocoanut oil of a tax which Congress declared should "be held as a separate fund and paid to the Treasury of the Philippine Islands" (48 U. S. Stat. 680, 763), the court said: "Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked

and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." (*Cincinnati Soap Co.* v. *United States*, 301 U. S. —; 57 Sup. Ct. Rep. 764.)

Nor may street railroads successfully resist this tax because of alleged competition by city owned subways and by taxicabs, both of which are exempted from this classification. A city's conduct in operating its own subways, and exempting them from taxation, does not render an act unconstitutional. (*Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619.) Innumerable valid reasons suggest themselves for treating taxicabs differently from transit companies and other utilities. (See *Hicklin* v. *Coney*, 290 U. S. 169, and cases cited therein.)

Plaintiff further contends that the tax bears so heavily upon it as not to constitute taxation at all, but to amount to a taking of its property without compensation in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

Plaintiff seeks to support the above contention through a process of elimination by insisting that these taxes cannot be justified otherwise and hence must amount to a taking of property. As we have heretofore shown, the classification of the utilities and the imposition of these taxes for unemployment relief is not unlawful. Moreover, hardship arising from the burden of taxation or excessiveness does not render invalid an otherwise valid tax. (*Fox* v. *Standard Oil Co.*, 294 U. S. 87. Cf. *Great Northern A. & P. Co.* v. *Grosjean*, 301 U. S. —; *Power* v. *Pennsylvania*, 127 U. S. 678.)

It follows that the orders should be reversed and the complaint dismissed with costs in all courts, and the question certified answered in the negative.

Crane, Ch. J., Lehman, Hubbs, Loughran and Rippey, JJ., concur; O'Brien, J., taking no part.

Orders reversed, etc.